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SUPREME COURT OF THE UNITED STATES

October Term, 1936.

No. 658

PAUL SENN, APPELLANT,

vs.

TILE LAYERS PROTECTIVE UNION, LOCAL No. 5, CHARLES SCHREIBER, ET AL.,

Appeal from the Supreme Court of the State of Wisconsin

BRIEF OF APPELLANT

LEON B. LAMFROM,

Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES

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No. 658

PAUL SENN, APPELLANT,

vs.

TILE LAYERS PROTECTIVE UNION, LOCAL No. 5, CHARLES SCHREIBER, ET AL.,

Appeal from the Supreme Court of the State of Wisconsin

BRIEF OF APPELLANT

OPINION OF SUPREME COURT OF WISCONSIN:

SENN V. TILE LAYERS PROTECTIVE UNION, LOCAL NO. 5, et al., 268 N. W. 270, decided June 29, 1936, (not yet officially reported); petition for rehearing denied September 15, 1936, 268 N. W. 872, (not yet officially reported).

STATEMENT OF CASE

This is an appeal from a judgment of the Supreme Court of the State of Wisconsin handed down on June 29, 1936, affirming a judgment of the trial court, the Circuit Court of Milwaukee County, Wisconsin, in favor of the defendants (appellees), denying the plaintiff (appellant) a permanent injunction enjoining the defendants from picketing, banner-

ing as unfair, and boycotting the plaintiff for the purpose of forcing him to sign a contract with the defendant Tile Layers Union (R. 116-122, majority opinion; R. 123-130, minority opinion), the material clause of which contract is as follows:

> "ARTICLE III. It is definitely understood that no individual, member of a partnership or corporation engaged in the Tile Contracting Business shall work with the tools or act as Helper but that the installation of all materials claimed by the party of the second part as listed under the caption 'CLASSIFICATION OF WORK' in this agreement, shall be done by journeymen members of Tile Layers Protective Union Local No. 5." (R. 113)

None of the employees of the plaintiff were, at the time the demand was made by the defendant unions or at the time of the commencement of the action, members of either of the defendant unions; no contractual relations existed between the plaintiff and the defendant unions; and the defendant unions had not been designated by any of plaintiff's employees as their agent for collective bargaining or for any other purpose (R. 26, Finding of Fact No. 7).

Appellant has been for about five years a small tile contractor whose shop is at his home in the City of Milwaukee, where he lives with his wife and four children (R. 44-45). He maintains a show room at another place in said city where he has on display samples of tile (R. 45). He customarily employs one tile layer and one helper, depending upon the amount of work he has contracted to do (R. 50). He has always worked on his jobs with his tools and hands either as a tile layer or tile layer's helper (R. 47, 50), for which work he was fully experienced and capable (R. 50, 64-65, 81-82, 83, 99, 100). His business is a very small one. He has invested approximately $700 in his tools, equipment and supplies. During the year 1935, he made approx-

imately $1500 on the contracts which he performed together with his employees, about one-half of this income being attributable to his own labor (R. 51). His income from his tile laying business has been and is his sole source of income (R. 53).

Between March 14, 1935, and December 6, 1935, the Business Agent and other representatives of the defendant Tile Layers Union made demands upon the plaintiff that he enter into a contract with their union, by the terms of which contract, among other things, appellant would have to agree to Article III thereof hereinabove set forth (R. 55, 60, 79).

Appellant was agreeable to entering into said contract, provided only that Article III was changed so that he would not be deprived of the right to work in his own business, (R. 40, 58-59, 78). He was ready, willing and able to comply with every demand, excepting the demand that he give up his right to work with his tools and his hands in his own business (R. 58-59, 78).

Under the contract, as demanded by the defendant unions, appellant would have been deprived of the right to work with his own tools and hands in his own business, regardless of whether or not he was eligible to union membership. He, however, would also have been deprived of the right to work as an employee for any employer operating under a union shop contract with the defendant unions, inasmuch as he was not eligible to union membership. To be eligible, he would have had to serve as an apprentice as required by the Constitution of the Bricklayers, Masons and Plasterers International Union of America, which provides that all apprentices shall attend a technical night school for one year during their term of apprenticeship and that all regularly assigned apprentices shall be required to serve not less than three (3) years as such (R. 28, Finding of Fact No. 16; R. 66).

Thereafter, because of appellant's refusal to sign the contract as demanded by the unions, the appellees, their agents and servants, picketed the appellant's home, commencing December 6, 1935 (R. 62), followed the plaintiff as he went around the city to and from his jobs (R. 63), picketed the appellant's jobs (R. 92-93), bannered him with signs reading, "P. Senn Tile Company unfair" and "Have the union tile setter set your tile" (R. 64), and threatened to boycott the architects and contractors with whom appellant was doing business (R. 93-94), which last activity the appellees' counsel at the trial agreed to have discontinued (R. 103-104, 105). No assurance, other than this statement of counsel, was given that this boycott of contractors and architects would not be indulged in.

From the judgment of the Circuit Court of Milwaukee County an appeal was taken to the Supreme Court of the State of Wisconsin, which affirmed the judgment of the trial court by a divided court, five judges concurring in the majority opinion (R. 119-122) and two judges concurring in the dissenting opinion (R. 123-130).

The Supreme Court of Wisconsin held that the demand upon the appellant to desist from working with his own hands and tools in his business was a lawful and reasonable demand (R. 120-122) and that the activities of the defendants to force the plaintiff to accede to their demands were made lawful by *Sections 103.51 to 103.63* of the Wisconsin Statutes of 1935, known as the Wisconsin Labor Code (R. 121-122). *Sections 103.51 to 103.63* were at the time of the trial Sections *268.18 to 268.30* of the Wisconsin Statutes of 1933.

In affirming the decision of the trial court and denying appellant relief, the Supreme Court followed its decision in the case of *American Furniture Company v. I. B. of T. C.*

and H. of A., etc., 268 N. W. 250 (not yet officially reported), insofar as it upheld, as against the Fourteenth Amendment to the Constitution of the United States, the constitutional validity of the Wisconsin Labor Code. Said case was decided at the same time that the Supreme Court of Wisconsin decided the case at bar.

In the *American Furniture Company* case, the defendant union demanded of the employer that all of its employees become members of the union and that it sign a contract with the union. None of its employees were members of the demanding union or desired to become members but voted against becoming members of said union. The union commenced to picket the employer's place of business and banner it as being unfair to organized labor, and the Supreme Court of Wisconsin held that the so-called Wisconsin Labor Code made it lawful for the union, by such methods, to force the employer to coerce its employees to join such union. This decision was by a divided court, 4 to 3.

In the case at bar, upon appellant's motion for rehearing, the Supreme Court of Wisconsin handed down the following opinion:

> "Upon the motion for rehearing, the plaintiff contends that to enforce the decision of this court would deprive him of the right to make his own livelihood with his own hands and tools, and that even if a labor dispute, as defined by sections 268.18 to 268.30, Stats. 1933, now sections 103.51 to 103.63, Stats. 1935, exists, that sections 103.56 and 103.62, Stats. 1935, are unconstitutional and invalid as violating both the Wisconsin and Federal Constitutions. These contentions were urged in the original brief of plaintiff, were fully considered by this court in the decision of this case, and held to be without merit. These claims were not more particularly treated in the opinion deciding this case, because, as disclosed in the opinion, the views of this court upon the constitutional questions raised were decided adverse-

ly to the contentions of plaintiff in the case of American Furniture Co. v. I. B. of T. C. and H. of A. etc., 268 N. W. 250, decided at the time time." (R. 132)

ASSIGNMENT OF ERRORS

1. Said Supreme Court of the State of Wisconsin erred in rendering judgment affirming the judgment of the Circuit Court of Milwaukee County, Wisconsin, in holding the Wisconsin Statutes of 1935, Sections 103.51 to 103.63, as construed by said Circuit Court of Milwaukee County, Wisconsin, in this cause, to be a constitutional and valid act not in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that such construction deprived appellant of liberty or property without due process of law, and denied to appellant, a person within the jurisdiction of the State of Wisconsin, the equal protection of the laws. (R. 2)

2. Said Supreme Court of the State of Wisconsin erred in failing to render judgment in favor of the appellant and thus reversing the judgment of the Circuit Court of Milwaukee County, Wisconsin, and in refusing, by failing to reverse said judgment of the Circuit Court of Milwaukee County, Wisconsin, to grant the relief prayed for by the appellant, for the reason that the refusal of the Supreme Court of the State of Wisconsin to so reverse said judgment of the Circuit Court of Milwaukee County, Wisconsin, was based upon a construction of said Wisconsin Statutes of 1935, sections 103.51 to 103.63, as applied to this cause, holding said statutes constitutional and valid, for the reason that such construction of said statutes is in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States in that such construction of said statutes deprived the appellant of liberty or property without due process of law and denied to appellant, a person within the

jurisdiction of the State of Wisconsin, the equal protection of the laws. (R. 2-3)

3. Said Supreme Court of the State of Wisconsin erred in granting judgment affirming the judgment of the Circuit Court of Milwaukee County, Wisconsin, because by the affirmance of said judgment of the Circuit Court of Milwaukee County, Wisconsin, the judgment of the Supreme Court of the State of Wisconsin operated as a judicial decision to deprive the appellant of liberty or property without due process of law and denied to the appellant, a person within the jurisdiction of the State of Wisconsin, the equal protection of the laws, in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States, for the reason that the judgment of the Supreme Court of the State of Wisconsin affirming the judgment of the Circuit Court of Milwaukee County operated as a denial to the appellant of a judicial remedy for the protection of appellant's rights of liberty and property and the equal protection of the laws under Section 1 of the Fourteenth Amendment to the Constitution of the United States in that said judgment of the Supreme Court of the State of Wisconsin deprived appellant of a judicial remedy for the protection of such rights and was, in effect, a taking of liberty or property from the appellant without due process of law and a denial to the appellant, a person within the jurisdiction of the State of Wisconsin, of the equal protection of the laws under said Section 1 of the Fourteenth Amendment to the Constitution of the United States. (R. 3)

4. Said Supreme Court of the State of Wisconsin erred in failing to render judgment reversing the judgment of the Circuit Court of Milwaukee County, Wisconsin, in that the refusal of the Supreme Court of the State of Wisconsin to so reverse the judgment of the Circuit Court of Milwaukee County, Wisconsin, and the refusal of the Supreme Court of

the State of Wisconsin to order, by such reversal, the said Circuit Court of Milwaukee County, Wisconsin, to grant appellant the relief prayed for was a judicial act depriving appellant of liberty or property without due process of law and denying to appellant, a person within the jurisdiction of the State of Wisconsin, the equal protection of the laws, in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and such refusal of the Supreme Court of the State of Wisconsin to reverse said judgment of the Circuit Court of Milwaukee County, Wisconsin, in effect denied to the appellant a judicial remedy for the protection of his rights under said Section 1 of the Fourteenth Amendment to the Constitution of the United States. (R. 3-4)

5. Said Supreme Court of the State of Wisconsin erred in affirming the judgment of the Circuit Court of Milwaukee County, Wisconsin, and thus holding said Sections 103.51 to 103.63 of the Wisconsin Statutes of 1935, formerly Sections 268.18 to 268.30 of the Wisconsin Statutes of 1933, as construed by said Supreme Court of the State of Wisconsin in this cause, constitutional and valid in that they did not deprive the appellant of liberty or property without due process of law and did not deny the appellant, a person within the jurisdiction of the State of Wisconsin, the equal protection of the laws. (R. 4)

6. Said Supreme Court of the State of Wisconsin erred in rendering judgment refusing to hold Sections 103.51 to 103.63 of the Wisconsin Statutes of 1935, formerly Sections 268.18 to 268.30 of the Wisconsin Statutes of 1933, invalid and in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States, for the reason that the judicial construction of said sections, as construed by said Supreme Court of the State of Wisconsin, conferring a legal right upon the appellees to engage in the

conduct against the appellant complained of, operated to deprive appellant herein of liberty or property without due process of law and to deny to the appellant, a person within the jurisdiction of the State of Wisconsin, the equal protection of the laws, in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States. (R. 4)

7. Said Supreme Court of the State of Wisconsin erred in affirming the judgment of the Circuit Court of Milwaukee County Wisconsin, for the reason that the judgment of the Supreme Court of the State of Wisconsin operated as a judicial decision depriving the appellant of liberty or property without due process of law and denying to the appellant, a person within the jurisdiction of the State of Wisconsin; the equal protection of the laws, in contravention of Section 1 of the Fourteenth Amendment to the Consitution of the United States. (R. 4-5)

STATUTES INVOLVED

The statutes which appellant contends are unconstitutional under Section 1 of the Fourteenth Amendment to the United States Constitution, as construed by the Supreme Court of the State of Wisconsin, are Sections 103.51 to 103.63 of the Wisconsin Statutes of 1935. Said sections are known as the Wisconsin Labor Code, which became effective June 30, 1931. Said statutes will be found printed in full in the Appendix at pages 51 to 61.

SUMMARY OF ARGUMENT

POINT I—The Wisconsin Labor Code, Sections 103.51 to 103.63, Wisconsin Statutes of 1935, as Construed by the Supreme Court of the State of Wisconsin, deprives Appellant of Property Without Due Process of Law.

Appellant contends that the Wisconsin Labor Code, as construed by the Supreme Court of the State of Wisconsin, in so far as it denies relief against picketing and related activities against an employer by labor unions, whether or not they represent any of the employer's employees, *engaged in for the purpose of compelling an employer to give up his right to work in his own business*, contravenes the guaranty against deprivation of property without due process contained in Section 1 of the Fourteenth Amendment to the United States Constitution. Certainly, such activities, engaged in for *that purpose, when engaged in by labor unions representing none of the employer's employees*, cannot be rendered lawful by any statute without running afoul of said constitutional guaranty against the deprivation of property without due process.

The statute which declares such activities lawful under the circumstances revealed in the case at bar bears no relation to the public health. It bears no relation to the safety or good order of the public. So far as it has any effect on safety and good order, the tendency is to disserve rather than serve them. The welfare served by the Wisconsin Labor Code is not that of the public but that of a particular class of the public to the detriment of other classes of the public.

The Wisconsin Labor Code cannot be justified as a valid exercise of the police power under the well-known rules applicable thereto. The right of a citizen of the United States to work in a lawful business in a lawful manner and the right to follow any of the ordinary callings of life is an inalienable right which cannot be taken away without violating the Fourteenth Amendment. A state legislature cannot deprive citizens of the United States of such right, and, *a fortiori*, such right cannot be taken away by labor unions on the ground that that right is vested in them by a statute. *It is the bounden duty of courts to protect such right.* A man

may not barter away his life or freedom and cannot be forced by labor unions or anyone else to relinquish such right.

Truax v. Corrigan, 257 U. S. 312, 66 L. Ed. 254

Butchers' Union Slaughter-House and Live Stock Landing Company v. Crescent City Live Stock Landing and Slaughter-House Company, 111 U. S. 746, 28 L. Ed. 585

Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229, 62 L. Ed. 260

Coppage v. Kansas, 236 U. S. 1, 59 L. Ed. 441

Truax v. Raich, 239 U. S. 33, 60 L. Ed. 131

Adair v. United States, 208 U. S. 161, 52 L. Ed. 436

POINT II—The Wisconsin Labor Code, as Construed by the Supreme Court of Wisconsin, Denies Appellant the Equal Protection of the Laws.

Appellant was denied a remedy and was refused injunctive relief solely on the ground that the acts which he sought to have restrained were acts carried on in the course of a "labor dispute" within the meaning of the Wisconsin Labor Code. Appellant, under the Constitution of the State of Wisconsin and the statutes promulgated pursuant thereto, *but for the Wisconsin Labor Code as construed by the Supreme Court of the State of Wisconsin*, would have been accorded the relief that he sought. He is denied that relief against the appellees because of the fact that the appellees happen to be labor unions having in their membership employees of others in the same line of business and because he happens to be an employer.

Had the appellees not been labor unions representing workers in the industry and had the appellant not been an

employer, the activities of the appellees would have been restrained.

No dispute was here involved concerning wages, hours or working conditions of any of appellant's employees. The sole dispute was concerning the appellant's right to work in his own business with his own hands.

Appellant contends that the classifications established by the Wisconsin Labor Code, whereby relief is denied against labor unions which would be granted against others, and whereby relief is denied to an employer which would be granted to an individual employing no one, are wholly arbitrary, capricious and unreasonable and for that reason the Wisconsin Labor Code Violates Section 1 of the Fourteenth Amendment to the United States Constitution.

It is appellant's position that no classifications can reasonably be made and sustained which will give *any* group the right to picket, boycott and molest an individual *for the purpose of forcing him, against his will, to agree not to work with his own hands in his own business.* Any statute sanctioning such activity for such purpose by a group, neither employees nor ex-employees of the employer and not representing any of them, is clearly discriminatory and arbitrary and cannot be sustained under any theory as a proper exercise of the police power.

Truax v. Corrigan, 257 U. S. 312, 66 L. Ed. 254

In re Opinion of the Justices, 275 Mass. 580, 176 N. E. 649

In re Opinion of the Justices, 86 N. H. 597, 166 Atl. 640.

POINT III—Inasmuch as None of Senn's Employees Were Members of Appellee Unions and Said Unions Represented None of His Employees, the Statutes, Construed so as to Deny Senn the Right to Relief from Picketing and Related Activities by Said Unions, Deprived Him of Liberty and Property Without Due Process and Denied Him the Equal Protection of the Laws.

Appellant contends, first, that in so far as the Wisconsin Labor Code denies him a remedy against picketing and related activities engaged in for the sole purpose of forcing him, against his will, to give up his right to work in his own business with his own hands, it deprives appellant of property without due process and denies him the equal protection of the laws; and, second, that the Wisconsin Labor Code, in so far as it denies him relief against picketing *for any purpose* by a group, neither his employees nor ex-employees and not representing any of them, deprives him of property without due process and denies him the equal protection of the laws.

Under Point III of our argument, we maintain that even if the dispute between the appellant and appellee unions was concerning wages, hours and working conditions of appellant's employees, the statute, as construed by the Supreme Court of Wisconsin, nevertheless, violates the Fourteenth Amendment to the United States Constitution, *if it denies relief against such activities engaged in by a group neither employees nor ex-employees of an employer and not representing any of them.*

All that we have heretofore said under Points I and II is equally applicable to a consideration of this point. All that we have said concerning the unreasonableness and arbitrariness of a statute which attempts to legalize such activities and denies relief against the same applies here.

ARGUMENT

Point I.

Sections 103.51 to 103.63 of the Wisconsin Statutes of 1935, as Construed by the Supreme Court of the State of Wisconsin, Deprive Appellant of Property Without Due Process of Law.

Although none of Senn's employees were members of the appellee unions, and although neither of the appellee unions represented any of Senn's employees for collective bargaining, the said unions placed Senn in the position where he had to either give up his right to work in his own business by signing the contract (R. 112-115) containing Article III, or, if he refused to do so, give up his right to conduct his business free from molestation and interference.

The union took up with Senn the matter of the execution of said contract three or four times, and in the discussions of the union representatives with Senn, there was always one point upón which they could not get together and that point was Article III of the contract. Until Senn is willing to accept Article III of the contract, there will be no contract between Senn and the union (R. 33-34). Senn could not sign the agreement because he had to earn his living with his own hands (R. 40).

After picketing of Senn's home and his jobs commenced, the position of the union was, as is shown by the following testimony of Charles Schreiber, the Business Agent of the defendant, Tile Layers Protective Union, Local No. 5:

"Q. Now, what would you require of Mr. Senn to do today in order that you give up picketing his home and from picketing the jobs he works on?

"A. Sign this agreement.

"Q. If he did that you would pull off the pickets?

"A. Yes, and furnish him with union men.

• • •

"Q. Unless he agreed to quit work himself with his tools you wouldn't enter into a contract with him?

"A. Correct.

"Q. Until he does agree to lay down his tools and only employ union men to do the work he himself is now doing, until that time you intend to use what your attorney called economic pressure?

"A. Lawful picketing.

• • • •

"Q. Mr. Schreiber, if Mr. Paul Senn agrees to every article of your proposed contract, except article 3, you will still continue to picket?

"A. I don't understand the question.

"Q. If he agrees to every article of the ten articles except article 3?

"A. Yes, sir.

"Q. Will you still continue picketing?

"A. Yes."

(R. 43-44)

Senn made his position perfectly clear. At all times he was willing to sign the union agreement provided Article III would be changed so that he could work (R. 59).

This is conceded in the statement of defendants' counsel:

"Mr. Padway: He is willing to do everything we ask of him but the one thing, 'I won't abstain, or promise to abstain from working with the tools of the trade at tile setting'." (R. 67)

Senn never approached the defendant unions. The unions approached him. He never asked the unions for the right to enter into a contract with them (R. 33, 54-55). He, on the other hand, was willing to enter into a contract with the union if the union would not insist upon having the clause in it which would require him to give up the right to work in his own business (R. 40, 58-59).

It is undisputed that the purpose of the picketing was to make Senn operate a union shop, drop his tools and hire union labor to do the work for him, and that in order to consummate such objective of the unions, he would have to sign the contract, Plaintiff's Exhibit 1 (R. ~~23~~ 17, Finding of Fact No. ~~20~~ 18; R. 44).

The union agent Schreiber testified:

"Q. Mr. Schreiber, what is the present purposes of the union in picketing Mr. Senn at the present time?

"A. Our union, or rather the trade of the tile layers for the last two or three years has been so demoralized by the outside fellows cutting into our trade, which don't belong, and even those who do go out contracting, and our union is so developed we have to do something to try to eliminate that source of supply we will say.

"Q. Then the purpose of picketing Senn at the present time is to eliminate what you call a source of supply in the union situation?

"A. To sort of in a way, yes. To have him come into the union shop, drop his tools and hire union labor to do the work for him.

"Q. In order to consummate such a relationship, if you are successful in contravening this petition he would have to sign the contract you sent him?

"A. Yes.

"Q. Suppose Mr. Senn was willing to sign the contract as you sent him without the third clause?

"A. He cannot.

"Q. I know that. Let's get that clearly. It covers the laying down of his tools?

"A. They are not his tools. That is the argument.

"Q. I understand it there.

"A. Well, we don't. They are not his tools.

"Q. Let's not have a dispute. Wait until I finish with the question. I will rephrase it.

"A. That is better.

"Q. Assuming that Mr. Senn would be perfectly willing to sign this contract, which is in evidence here, which the union sent him without clause 3 included in it, would that be satisfactory to the union?

"A. No.

"Q. Then the only way that Senn can make peace with this union at the present time is by signing the contract, which you sent him, as it is written?

"A. As the other ten or eleven contractors in this town did. Yes, sir." (R. 83-84)

It is clear from this testimony that the immediate purpose of the union was as is indicated in the outset of this argument. As a result thereof, Senn was confronted with two alternatives, which, we contend, are in effect the same thing. One of the alternatives was, Sign this contract and get out of business to the extent that you cannot work in your own business, and the other alternative was, Persist

in working in your own business and you will have to get out of business. It seems to us that the very statement of this proposition proves the entire illegality of the position of the unions herein.

Senn's work in his own business consisted of setting tile, mixing mud, carrying mud—everything to make the tile work as easy as he could. He personally set as much tile as he could (R. 49).

The acts of the defendants, by which they sought to enforce their demands, were commenced on December 6, 1935, and consisted of picketing his home and picketing his jobs. When the picketing commenced on December 6, 1935, at his home, the Business Agent Schreiber was there with two pickets. He said, referring to the picketing, "Well, we are going to keep it up and we will picket the jobs." (R. 61-62). The pickets' cars followed him when he started out with his truck. They chased him at times for miles. Sometimes he had to go as much as two miles and sometimes he got rid of them in the first thirty seconds of the chase. Because he was followed, he did not use his truck very often. When he completed a job, he could not move all of his equipment in a car which he used so he had to move his equipment on a Sunday and he was chased for several miles with his truck (R. 63).

On July 11, 1935, the defendants sent to architects and contractors in Milwaukee a letter (Plaintiff's Exhibit 6) from the Tile Layers Protective Union, Local No. 5, in which was listed the names of the firms in harmony with them as union contractors, from which Senn's name was omitted. In this letter, they said to the architects and contractors, "If in two weeks time anyone outside this list is awarded tile work we will then picket such jobs, contractors' or architects' offices, or employ other lawful means

to help us in our fight to better the conditions of our trade." (R. 42-43).

It is true that the defendants' counsel at the close of the testimony in the trial court stated that his clients would not make any threats or statements to the contractors, or architects, or others, and that no punishment would be inflicted upon them for giving work to Senn (R. 103-104). He also stated that he would advise his clients, unless the court ruled otherwise, that they may picket the premises of Senn, and, if they knew where he performed his jobs, they may picket the jobs, with appropriate information to the public on the signs as to the nature of the controversy (R. 104). The court permitted these statements to stand as a part of the record despite the objections of counsel (R. 104-105) that they were not competent evidence.

The picketing of Senn was done with banners. One sign read, "P. Senn Tile Company is unfair to the Tile Layers Protective Union" and another sign read, "Let the Union tile layer install your tile work." (R. 41)

The defendants justified their demands and conduct, and the Supreme Court of Wisconsin upheld such justification, on the ground that a labor dispute existed between the appellant and the appellee unions, as defined in the Labor Code, now Sections 103.51 to 103.63 of the Wisconsin Statutes of 1935, and that their activities were sanctioned by said Statutes (R. 120-121, 132).

The trial court found that a labor dispute existed; that it was not unlawful for the defendants, in furtherance of the dispute, to do what they had done; that the agreement submitted by the defendants to the appellant is sought by the defendants for the purpose of promoting their welfare and enhancing their own interests in their trade and craft

as workers in the industry; that Article III of the agreement is a reasonable and lawful rule adopted by the defendants out of the necessities of the employment within the industry and for the protection of themselves as workers and craftsmen in the industry (R. 29).

The plaintiff requested of the trial court, among others, the following Conclusion of Law:

> "3. That the contract which the defendant union, Local No. 5, demanded that the plaintiff sign, in so far as it contains the provisions set forth in finding of fact No. 12 (referring to proposed finding of fact No. 12 of the plaintiff, which set forth Article III of the contract) is illegal and contrary to the public policy of this state, and if the court were not to grant relief against the acts of the defendants against the plaintiff, as set forth in the findings, for the purposes therein set forth, it would be a violation of the Fourteenth Amendment to the Constitution of the United States, which guarantees to every person a fundamental right to work with his own hands at his trade without unlawful interference and hinderance." (R. 111)

Upon the close of the testimony, and in the arguments, appellant's counsel had also challenged the validity of said sections of the Wisconsin Statutes as against Section 1 of the Fourteenth Amendment to the Federal Constitution on the ground that if such sections were so construed by the court as to deprive the plaintiff of his right to relief by injunction, appellant would be deprived of life, liberty or property without due process of law and would be denied the equal protection of the laws. The court duly considered the arguments on the constitutionality of the statutes and decided that said statutes denied appellant any relief and that they, and each of them, were constitutional and valid under the Constitution of the United States and the Constitution of the State of Wisconsin (R. 105).

The majority opinion of the Supreme Court of the State of Wisconsin upheld this construction of the said statutes by the trial court and their validity. Referring to this opinion of the majority, the *minority opinion* states:

> "The practice upheld by the court is Un-American, oppressive and intolerable. It is contrary to the concept that I have always had of the fundamental and inalienable rights of the individual citizen secured to him by the Constitution of the United States. I cannot see that concept held for naught by this court without protest. And I will not yield that concept until it is declared erroneous by the final arbiter of that Constitution. *My concept of the inherent rights of man under the Constitution may be merely an ideal that I may eventually have to give up, but I am still strong in my faith in it; and I will ever cherish it unless it shall be destroyed by the ultimate authority, the Supreme Court of the United States.* (italics ours)
>
> "The defendants claim that absence of due process in their depriving the plaintiff of his property and his liberty is avoided by the provision of the code declaring peaceful picketing lawful and because, as they say, the plaintiff is free to work with his hands and tools upon his jobs if he wants to. As to the latter, the plaintiff is no more free so to work in the face of the threat of destruction of his business and deprivation of his means of livelihood by continued and incessant picketing than he would be in the face of a threat to 'beat him up' every time he took a contract for tiling." (R. 127)

Further, the dissenting opinion states:

> "The statute declaring peaceful picketing lawful bears no relation to the public health. It bears no relation to the safety or good order of the public. So far as it has any effect on safety and good order the tendency is to disserve rather than serve them. And as I understand the welfare requirement, the welfare served must be that of the public, not that of a particular class of the public to the detriment of another class of the public. To rule that peaceful picketing in every case is lawful would serve the interest of organized labor

to the detriment of unorganized labor and not induce to the welfare of the public as a whole. If this may be done, a Legislature could enact any statute whatsoever affecting the rights of the citizen under the claim that it serves the public welfare and it would be immune from attack as withholding due process. To justify statutes affecting one class of the society to the detriment of another class, if there can be any such justification, the advantage to the one class must at least so overbalance the disadvantages to the other that the welfare of the public as a whole is thereby advanced. The instant statute, if applied to the situation here involved, in my opinion does not meet these tests." (R. 130)

We think the following additional quotation from the minority opinion (pp. 274-275) is an unanswerable argument that the construction of said statutes by the Supreme Court of Wisconsin, renders them invalid as depriving the appellant of property without due process of law:

"While the above is sufficient in my opinion to require reversal of the judgment herein and the granting of an injunction, I wish to say further that in the instant case, however it may be in the American Furniture Co. Case, supra, the picketing involved in my opinion deprives the plaintiff of liberty and property without due process of law. The Fifth Amendment to the Constitution of the United States declares that no person shall be so deprived. If no person shall be so deprived, then no person shall so deprive him. Injury to business is the deprivation of property. Truax v. Corrigan, 257 U. S. 312, 42 S. Ct. 124, 128, 66 L. Ed. 254, 27 A. L. R. 375. To deprive one of his right to labor is to deprive him of his liberty. Allgeyer v. Louisiana, 165 U. S. 578, 589, 17 S. Ct. 427, 431, 41 L. Ed. 832. Under the facts of the case, the picketing involved injures the plaintiff's business, deprives him of opportunity to labor, and inflicts irreparable injury upon him for which he has no adequate remedy at law. Hence the picketing should be enjoined, unless the injury resulting to the plaintiff from it is effected through due process of law.

" 'The right to follow any of the common occupations of life is an inalienable right. * * ** This right is a large

ingredient in the civil liberty of the citizen. * * * The right to follow any of the ordinary callings of life—is one of the privileges of a citizen of the United States.' Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co., 111 U. S. 746, 762, 764, 765, 4 S. Ct. 652, 657, 28 L. Ed. 585. The liberty mentioned in the Fifth Amendment as well as the Fourteenth Amendment 'means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned.' Allgeyer Case, supra. As quoted in Cameron v. International Alliance of T. S. E. and M. P. O., 118 N. J. Eq. 11, 176 Atl. 692, 698, 97 A. L. R. 594:

"'There is no more sacred right of citizenship than the right to pursue unmolested a lawful employment in a lawful manner. It is nothing more nor less than the sacred right of labor.' * * *

"'The right of a workman to the "free use of his hands" has been described as one "of which the Legislatures cannot deprive him, one which the law of no trades union can take from him, and one which it is the bounden duty of the courts to protect." * * * "A man may not barter away his life or his freedom, or his substantial rights." Home Ins. Co. v. Morse, 20 Wall. 445, 451, 22 L. Ed. 365.'

"These statements imply that the right to labor with one's own hands when one will and as he will, the right to follow a chosen occupation or business, the right to earn one's own living, and the right to contract are so sacred, so valuable, so important to the individual, that no one may be coerced into giving them up, and when as here the means of coercing their surrender results in irreparable injury to the individual, the coercion should upon established principles of equity be enjoined. We are not here concerned with licensing restrictions or the

like imposed under the police power for the protection of the public. We need only consider the facts of the instant case to perceive the denial and deprivation of liberty of the plaintiff and I perceive no 'due process' by which the result is produced." (R. 124-125)

The majority opinion held that under its construction of Sections 103.51 to 103.63 of the Wisconsin Statutes of 1935, picketing by a labor union against an employer for the purpose of compelling him to give up his right to work in his own business with his own hands was made lawful by said statutes, despite the fact that none of the employees of the employer were members of the union and despite the fact that the labor union represented none of the employees for collective bargaining. It stated in this connection:

"Appellant has declined to sign the suggested contract unless there be eliminated therefrom the provisions which require him to desist from working with his tools and his helping generally in the work of installing material. Respondents insist that the particular rule to which appellant objects is one in the furtherance of the legitimate interests of the members of the unions. In view of our decision in the American Furniture Co. Case, supra, and the cases there analyzed in the opinion written by Mr. Justice Wickhem, it is apparent that, under the laws of Wisconsin, where the primary purpose of the acts complained of is to protect and improve the condition of those whom the unions represent, such action is justifiable, because it tends to promote the welfare of the members of the union engaged in the same craft. There is no effort to induce or compel the appellant to do any unlawful thing. If it be assumed that appellant cannot operate his business successfully upon the conditions insisted upon by the respondents, still no right of appellant now protected by law is invaded by respondents' efforts to bring appellant's business to union standard. American Furniture Co. v. I. B. of T. C. and H. of A., Chauffeurs, Teamsters and Helpers General Local No. 200 of Milwaukee, supra, and cases there cited. No question exists as to appellant's right to conduct a

nonunion shop under any terms he chooses. An economic contest has developed. Each of the contestants is desirous of the advantage of doing the business in the community where he or they operate. He is not obliged to yield to the persuasion exercised upon him by respondents." (R. 120-121)

How can this decision be squared with the language of this court in *Hitchman Coal & Coke Co. v. Mitchell,* 245 U. S. 229, 253-254, 62 L. Ed. 260:

> "Defendants set up, by way of justification or excuse, the right of workingmen to form unions, and to enlarge their membership by inviting other workingmen to join. The right is freely conceded, provided the objects of the union be proper and legitimate, which we assume to be true, in a general sense, with respect to the Union here in question. * * * The cardinal error of defendants' position lies in the assumption that the right is so absolute that it may be exercised under any circumstances and without any qualification; whereas in truth, like other rights that exist in civilized society, it must always be exercised with reasonable regard for the conflicting rights of others. (citing cases) The familiar maxim 'Sic utere tuo ut alienum non laedas'—literally translated, 'So use your own property as not to injure that of another person,' but by more proper interpretation, 'so as not to injure *the rights* of another' * * * —applies to conflicting rights of every description. For example, where two or more persons are entitled to use the same road or passage, each one, in using it, is under a duty to exercise care not to interfere with its use by the others, or to damage them while they are using it."

—or the statement in the case of *Butchers' Union Slaughter-House and Live Stock Landing Company v. Crescent City Live Stock Landing and Slaughter-House Company,* 111 U. S. 746, 764-765, 28 L. Ed. 585:

> "I hold that the liberty of pursuit, the right to follow any of the ordinary callings of life, is one of the privileges of a citizen of the United States. It was held by a majority of the court in the former decision of the *Slaughter-House Cases,* 16 Wall., 57 (83 U. S. XXI.,

402); that the 'Privileges and immunities of citizens of the United States' mentioned and referred to in the 14th Amendment, are only those privileges and immunities which were created by the Constitution of the United States and grew out of it or out of laws passed in pursuance of it. I then held and still hold, that the phrase has a broader meaning; that it includes those fundamental privileges and immunities which belong essentially to the citizens of every free government, among which *Mr. Justice* Washington enumerates the right of protection; the right to pursue and obtain happiness and safety; the right to pass through and reside in any State for purposes of trade, agriculture, professional pursuits or otherwise; to claim the benefit of the writ of *habeas corpus;* to institute and maintain actions of any kind in the courts of the State; and to take, hold and dispose of property, either real or personal. *Corfield v. Coryell,* 4 Wash. (C. C.), 371. These rights are different from the concrete rights which a man may have to a specific chattel or a piece of land or to the performance by another of a particular contract, or to damages for a particular wrong, all of which may be invaded by individuals; they are the capacity, power or privilege of having and enjoying those concrete rights and of maintaining them in the courts, which capacity, power or privilege can only be invaded by the State."

—or the holding in *Coppage v. Kansas,* 236 U. S. 1, 17, 59 L. Ed. 441, where this court said:

> "But the 14th Amendment, in declaring that a state shall not 'deprive any person of life, liberty, or property without due process of law,' gives to each of these an equal sanction; it recognizes 'liberty' and 'property' as coexistent human rights, and debars the states from any unwarranted interference with either."

—or the holding in *Truax v. Raich,* 239 U. S. 33, 41, 60 L. Ed. 131, where this court said:

> "It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure. Butchers' Union S. H. & L. S. L.

> Co. v. Crescent City L. S. L. & S. H. Co., 111 U. S. 746, 762, 28 L. ed. 585, 588, 4 Sup. Ct. Rep. 652; Barbier v. Connolly, 113 U. S. 27, 31, 28 L. ed. 923, 924, 5 Sup. Ct. Rep. 357; Yick Wo v. Hopkins, supra; Allgeyer v. Louisiana, 165 U. S. 578, 589, 590, 41 L. ed. 832, 835, 836, 17 Sup. Ct. Rep. 427; Coppage v. Kansas, 236 U. S. 1, 14, 59 L. ed. 441, L. R. A. 1915C, 960, 35 Sup. Ct. Rep. 240."

We respectfully submit that *Truax v. Corrigan,* 257 U. S. 312, 66 L. Ed. 254, is conclusive on the point that the Wisconsin Labor Code, as construed by the Supreme Court of the State of Wisconsin in the case at bar, violates Section 1 of the Fourteenth Amendment to the Constitution of the United States on the ground that it deprives appellant of property without due process.

In the *Truax* case, this court had before it for determination the validity, under the Fourteenth Amendment to the United States Constitution, of an Arizona statute, as construed by the Supreme Court of Arizona, limiting the power of the courts of Arizona to issue injunctions in labor disputes. We call particular attention to the fact that in the *Truax* case, the picketing and related activities were indulged in by a labor union actually representing employees of the plaintiff who were on strike. After laying down the principle that business is a property right within the due process guaranty of the Fourteenth Amendment and that intentional injury thereto by conspiracy is a tort, Mr. Chief Justice Taft, speaking for the court, stated:

> "It is argued that while the right to conduct a lawful business is property, the conditions surrounding that business, such as regulations of the state for maintaining peace, good order, and protection against disorder, are matters in which no person has a vested right. The conclusion to which this inevitably leads in this case is that the state may withdraw all protection to a property right by civil or criminal action for its wrongful injury, if the injury is not caused by violence. * * * It is true

that no one has a vested right in any particular rule of the common law, but it is also true that the legislative power of a state can only be exerted in subordination to the fundamental principles of right and justice which the guaranty of due process in the 14th Amendment is intended to preserve, *and that a purely arbitrary or capricious exercise of that power, whereby a wrongful and highly injurious invasion of property rights, as here, is practically sanctioned and the owner stripped of all real remedy, is wholly at variance with those principles.*" (Italics ours) (pp. 329-330)

As we heretofore pointed out, in the *Truax* case there was an active employer-employee labor dispute and the acts sought to be enjoined by the employer were acts engaged in by the union and its members in connection with said dispute. If the union in the *Truax* case, as in the case at bar, had not represented any of the employer's employees and the acts were not in furtherance of strike activities, what this court would have said in the *Truax* case, in addition to what it did say, can well be imagined. This appears clearly from the following statement of the court in the *Truax* case, which was made in answer to the argument that workmen's compensation laws were sustained which deprived an employer of defenses theretofore available to him:

> "They (these cases) hold that employers have no vested right in those rules of the common law. The broad distinction between one's right to the protection against a direct injury to one's fundamental property right *by another who has no special relation to him, and one's liability to another with whom he establishes a voluntary relation* under a statute, is manifest upon its statement." (p. 329) (Italics ours)

So here the fundamental right of Senn to labor in his own business, and remedies necessary to the protection thereof, cannot be taken away from him. There is no basis under any conception of public welfare by which the police power of the State of Wisconsin could be used to hand over to the

labor unions the right to deprive Senn of this constitutional privilege, which is more sacred and more deserving of protection by any government than almost any other right except life itself. The dissenting opinion of the Wisconsin Supreme Court ably states this proposition thus:

> "The only provision of the proposed contract to which he will not accede is the one denying him the right to labor with his own hands and tools upon the jobs he contracts to perform. He has not sufficient capital to enable him to take any but small jobs. Such jobs as he can handle will yield no profit unless he works upon them himself. He cannot make a living at laying tile as a journeyman without membership in the defendant union, and that is denied him because he has not served three years as apprentice to a journeyman tile layer, and without such membership he cannot procure sufficient employment as a journeyman. To picket his jobs will injure his business as a contractor and reduce his earnings below sufficiency for support of himself and family. Destruction of plaintiff's business through picketing is the object of the defendants and is likely to be attained if the picketing be continued, with resulting liability imposed upon the public for the support of himself and family, with resulting loss to the public of the benefit of his services as a tile layer, denial to the public of the benefit of his competition and, as it is the expressed purpose of the defendants to apply the restriction that it would place upon the plaintiff to all journeymen tile layers who shall aspire to become contractors, with resulting imposition upon the public of a monopoly of the tile laying business in the hands of members of the defendant union. Business in contracting for such work as tile laying ordinarily begins with small beginnings, and if successful gradually extends to more considerable proportions. The plaintiff's road to success in such business is blocked, and the entry into such business is blocked to every worker, by the requirement of the defendants to which plaintiff objects. The requirement that no contractor shall work with his own hands and his own tools upon a job would foreclose every worker, union as well as nonunion, from entering the contracting business unless he has or is able to procure capital other-

wise not necessary for entry into and prosecution of the business to success. I cannot believe that such result is made lawful by the claim that it is nothing but economic pressure applied to the furtherance of the cause of workers as a whole or of that class of workers belonging to labor unions. The view here expressed of right to an injunction under the situation here involved has the support of the only courts that have ever passed on situations closely similar. Roraback v. Motion Picture Machine Operators' Union, 140 Minn. 481, 168 N. W. 766, 169 N. W. 529, 3 A. L. R. 1290; Hughes et al. v. Kansas City Motion Picture M. O. Local No. 170 et al., 282 Mo. 304, 221 S. W. 95; Parker Paint & Wall Paper Co. v. Local Union No. 813 et al., 87 W. Va. 631, 105 S. E. 911, 16 A. L. R. 222." (R. 126-127)

It was well stated in *Roraback v. Motion Picture Machine Operators' Union,* 169 N. W. 529, 140 Minn. 481, 485, 3 A. L. R. 1290:

"If, men, either singly or in combination, may lawfully injure or destroy the business of another for the purpose of compelling him not to work in such business himself, it will have far-reaching consequences. Such a doctrine would limit the field of business to those who have sufficient capital to carry on a business without becoming operatives therein themselves, and would debar those who have little or no capital, except their personal skill and ability, from seeking to better their condition by engaging in business on their own account. Such a doctrine means that a machinist who starts a machine shop may lawfully be prevented from working therein as a machinist; that a carpenter who starts a carpenter shop may be required to have all his work done by others; that a barber who opens a barber shop must cease to work as a barber. It means that the man in any occupation who starts in business for himself, relying upon his personal skill and ability to attain success, must forego the right to profit by his own skill, at the arbitrary behest of another, or see his business ruined. Such is not the law. The right of every person to work in his own business is a fundamental right, guaranteed to him by the Bill of Rights in the Constitution and by the 14th Amendment to the Federal Con-

> stitution, and any attempt to deprive him of that right is necessarily unlawful. Truax v. Raich, 239 U. S. 33, 60 L. Ed. 131, L. R. A. 1916D, 545, 36 Sup. Ct. Rep. 7, Ann. Cas. 1917B, 283. However far members of an organization may go in an attempt to force an employer to employ members of the organization, an attempt to force him to desist from working himself in his own business is clearly an invasion of the rights secured to him by the Constitution." (Citing cases)

And, as is well said in the minority opinion in the Senn case, the only courts that have passed on this situation take the same position as to the interference by unions with the sacred right of one to labor in his own business.

In addition to the case of *Roraback v. Motion Picture Machine Operators' Union,* 169 N. W. 529, 140 Minn. 481, 3 A. L. R. 1290, we cite the following cases:

> *Hughes, et al. v. Kansas City Motion Picture M. O. Local No. 170 et al,* 282 Mo. 304, 221 S. W. 95.
>
> *Parker Paint & Wall Paper Company v. Local Union No.* 813, *et al.* 87 W. Va. 651, 105 S. E. 911, 16 A. L. R. 222.

In *New State Ice Co. v. Liebmann,* 285 U. S. 262, 278, 76 L. Ed. 747, this court said:

> "Plainly, a regulation which has the effect of denying or unreasonably curtailing the common right to engage in a lawful private business, such as that under review, cannot be upheld consistent with the 14th Amendment. Under that amendment, nothing is more clearly settled than that it is beyond the power of a state, 'under the guise of protecting the public, arbitrarily (to) interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them."

And so in the case at bar, as is stated in the *Liebmann* case at page 279:

"The control here asserted does not protect against monopoly, but tends to foster it. The aim is not to encourage competition, but to prevent it; not to regulate the business, but to preclude persons from engaging in it."

To the same effect as to the right of the state, under the guise of protecting the public, arbitrarily to interfere with private business, see:

Burns Baking Co. v. Bryan, 264 U. S. 504, 68 L. Ed. 813, 32 A. L. R. 661.

Liggett Co. v. Baldrige, 278 U. S. 105, 73 L. Ed. 204.

In the latter case, this court said, in passing upon a Pennsylvania statute requiring all pharmacies to be owned by duly licensed pharmacists (p. 113):

"A state cannot, 'under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them."

We respectfully submit that it must necessarily follow that a state cannot, under the guise of the police power, for the purpose of promoting unionism, interfere with the right of a man to work in his own business by denying protection to that right when invaded by the organized activity of others.

In *Allgeyer v. Louisiana,* 165 U. S. 578, 589, 41 L. Ed. 832, 17 S. Ct. 427, this court said:

"The liberty mentioned in that amendment means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; *to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation,* and for that

purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned." (Italics ours)

See also *Adair v. United States*, 208 U. S. 161, 52 L. Ed. 436.

It is, of course, assumed throughout this argument that the right to labor, important as it is to the individual, is not an absolute right. It is submitted, however, that this basic right of an individual is not subject to infringement and impairment by the state under the guise of a public policy designed to give labor unions what the legislature conceives to be advantages, on the ground that it is better for the people of the state that unions control the business field in the employer-employee relationship, when such control, as here exercised, shuts off the path of the individual to go into a legitimate business for himself.

It is asserted by the appellant that the construction of the Supreme Court of Wisconsin of this legislative enactment makes the enactment an unreasonable invasion of appellant's right of liberty and property, and it is respectfully submitted that the statutes, construed so as to deny appellant relief from interference with his right to work, violates Section 1 of the Fourteenth Amendment to the Federal Constitution.

Whether or not the appellant was qualified to do the work which he was doing in his own business is quite beside the point, and, we submit, entirely immaterial. Be that as it may, it is clearly established that the appellant was fully experienced and capable of doing the work which he was doing in his own business. (R. 50, 64-65, 81-82, 83, 99-100). Even if the appellant was not qualified, we respectfully submit that the legislature could not delegate to labor unions

the right to pass upon the qualifications of a person to work in his own business.

As pointed out in the minority opinion, if the appellant gave up his business as a contractor because he would not be able successfully to continue the same without working with his own hands, "his opportunity to work at his trade as a layer of tile would be diminished or destroyed because of exclusion from membership in the defendant union because he has not served three years as an apprentice under a journeyman tile layer. It is nonsense to claim that three years of such apprenticeship is necessary to enable a competent plasterer to lay tile. It is without dispute that the plaintiff was a competent plasterer before he took up the trade of laying tile and it is without dispute that he is now a competent tile layer. The unreasonableness of the requirement of apprenticeship ties up with the unreasonableness of the restriction of the plaintiff's right to follow his chosen occupation of a tile layer and as a contractor of tile jobs." (R. 123-124)

If labor unions can be given the power to picket and interfere with the right of an individual to work with his own hands in his own business, and, in effect, force him to give up this right, we have the anomolous situation where a group of individuals has a power not vested in the government itself under the facts here involved. Such labor unions are then more powerful than any government and subject to none of the limitations or restrictions to which governments are subject.

We respectfully submit that such power cannot be delegated consistent with the guarantees afforded citizens of the United States under Section 1 of the Fourteenth Amendment to the Federal Constitution.

POINT II.

The Wisconsin Labor Code, as Construed by the Supreme Court of Wisconsin, Denies Appellant the Equal Protection of the Laws.

The evidence set forth under Point I is equally applicable to this point.

Under Article VII, Section 8, of the Wisconsin Constitution, it is provided that circuit courts shall have the power to issue writs of injunction, and under Article VII, Section 2, of the Wisconsin Constitution, it is provided that "the judicial power of this state, both as to matters of law and equity, shall be vested in a supreme court, circuit courts, courts of probate, and in justices of the peace." (See Appendix page 62)

Section 268.01 of the Wisconsin Statutes of 1935 provides:

> *"Order substituted for injunction.* The writ of injunction is abolished. An injunction may be the final judgment in the action or may be allowed as a provisional remedy therein; and when so allowed it shall be by order as prescribed by this chapter."

It is also provided in subsection (1) of Section 268.02 of the Wisconsin Statutes of 1935, as follows:

> *"Temporary injunction; when granted.* (1) When it appears from his pleading that a party is entitled to judgment and any part thereof consists in restraining some act, the commission or continuance of which during the litigation would injure him, or when during the litigation it shall appear that a party is doing or threatens or is about to do, or is procuring or suffering some act to be done in violation of the rights of another party and tending to render the judgment ineffectual, a temporary injunction may be granted to restrain such act."

Thus, the decision of this court in *Truax v. Corrigan*, 257 U. S. 312, 66 L. Ed. 254, to the effect that, inasmuch

as the statutes there involved denied the employer equitable relief, it denied him the equal protection of the laws under the Fourteenth Amendment to the United States Constitution is entirely applicable to the facts in this case.

In speaking of the provisions of the Arizona Constitution and the Arizona Statutes which were substantially similar to the foregoing constitutional and statutory provisions of Wisconsin, this court stated in the *Truax* case:

> "The necessary and resulting effect of these provisions and of Section 1464 is that the plaintiffs in error would have had the right to an injunction against such a campaign as that conducted by the defendants in error, if it had been directed against the plaintiffs' business and property in any kind of a controversy *which was not a dispute between employer and former employees.*" (Italics ours) (p. 331)

This court then went on to say in the *Truax* case:

> "The guaranty was aimed at undue favor and individual or class privilege, on the one hand, and at hostile discrimination or the oppression of inequality, on the other. It sought an equality of treatment of all persons, even though all enjoyed the protection of due process. (pp. 332-333)
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> • • •
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> " • • • If, as is asserted, the granting of equitable remedies falls within the police power, and is a matter which the legislature may vary as its judgment and discretion shall dictate, this does not meet the objection under the equality clause, which forbids the granting of equitable relief to one man and the denying of it to another under like circumstances and in the same territorial jurisdiction.
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> • • •
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> " • • • Here is a direct invasion of the ordinary business and property rights of a person, unlawful when committed by anyone, and remediable because of its otherwise irreparable character by equitable process, except when committed by ex-employees of the injured person. If this is not a denial of the equal protection

of the laws, then it is hard to conceive what would be. To hold it not to be, would be, to use the expression of Mr. Justice Brewer in Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 154, 41 L. ed. 666, 667, 17 Sup. Ct. Rep. 255, to make the guaranty of the equality clause 'a rope of sand.'" (pp. 334-336)

Particularly significant in relation to the facts in the case at bar is the following language of this court in the *Truax* case (p. 339):

> "It seems a far cry from classification on the basis of the relation of employer and employee in respect of injuries received in course of employment to classification based on the relation of an employer, not to an employee, *but to one who has ceased to be so,* in respect of torts thereafter committed by such ex-employee on the business and property right of the employer. It is really a little difficult to say, if such classification can be sustained, why special legislative treatment of assaults upon an employer or his employees by ex-employees may not be sustained with equal reason. It is said the state may deal separately with such disputes because such controversies are a frequent and characteristic outgrowth of disputes over terms and conditions of employment. Violence of ex-employees toward present employees is also a characteristic of such disputes. Would this justify a legislature in excepting ex-employees from criminal prosecution for such assaults, and leaving the assaulted persons to suits for damages at common law?
>
> "Our conclusion, that plaintiffs are denied the equal protection of the laws is sustained by the decisions in this court. * * * "

We respectfully submit that the line of reasoning applied by this court in the *Truax* case has added force and, if possible, even greater conviction, when applied to the situation involved in the case at bar. Here the parties against whom relief is demanded had no dispute with the appellant concerning the wages, hours or working conditions of his employees and *the sole dispute was over his refusing to give*

up his right to work in his own business with his hands and tools. The line of reasoning applied by this court is also more convincingly applicable here when it is considered that *the appellee unions at no time represented any of the appellant's employees and,* so far as his business was concerned, *appellees were total strangers to him.*

In *In re Opinion of the Justices,* 275 Mass. 580, 176 N. E. 649, 654, the Supreme Judicial Court of Massachusetts, in passing on the Massachusetts bill substantially similar to the statutes here involved, stated:

> "However that may be, one dominating aim of this part of the bill seems to be to establish with respect to every 'labor dispute' as defined in section 12 (c) a substantially different method of procedure, subject to materially different prerequisites, conditions, rules of trial and extent of redress, from that established in any other kind of controversy where relief in equity is sought. This dominating purpose appears to be class legislation and to impair equality before the law and equal protection of equal laws to all persons, contrary to principles affirmed in Bogni v. Perotti, 224 Mass. 152, 112 N. E. 853, L. R. A. 1916F, 831, and Truax v. Corrigan, 257 U. S. 312, 42 S. Ct. 124, 66 L. Ed. 254, 27 A. L. R. 375."

And, likewise, it was said by the Supreme Court of New Hampshire, *In re Opinion of the Justices,* 86 N. H. 597, 166 Atl. 640, 645, in commenting, among other things, upon Section 3 of the proposed New Hampshire bill, which was very much like the statutes here involved:

> "Judged by the standard thus set, it is our opinion that an act denying to employers of labor any part of the full right accorded to others to resort to the courts for relief would be unconstitutional. Such is the purport of many of the provisions contained in sections 3 to 9 of the proposed bill, and to this extent it would not become a valid law if enacted.
>
> "For like reasons the Federal Supreme Court has held similar provisions in a state statute to be invalid

under the Federal Constitution. Truax v. Corrigan, 257 U. S. 312, 42 S. Ct. 124, 66 L. Ed. 254, 27 A. L. R. 375."

And it is well said further in this opinion at page 645:

> "It may be added that many of the activities described in section three and commonly employed in the conduct of a strike are such that no court would enjoin them, except in a case where the strike itself was illegal, either in its inception or in its execution But if, for example, the strike were instituted or carried on in the execution of a conspiracy to injure the employer, all means for its furtherance might be enjoined. The bill makes no such distinction."

And here, in the case at bar, *we have no strike.* We have a concert of activities by outsiders who have no relation to the appellant, the purpose of which is to make appellant do their will at the sacrifice of his right to labor as he chooses, and the Supreme Court of Wisconsin has held that it cannot protect that right because of statutes similar to those under consideration in the New Hampshire advisory opinion.

We respectfully submit that no classification can be reasonably made and sustained which will give *any* group the right to picket, boycott and molest an individual *for the purpose of forcing him, against his will, to agree not to work with his own hands in his own business.* A legislative classification which denies *employers* as a class injunctive relief from such activities engaged in *for that purpose,* while such relief is accorded individuals who are not employers, is wholly unreasonable, arbitrary and discriminatory and cannot be sustained as a valid exercise of police power.

Even if picketing for the purpose of forcing an individual employer not to work with his own hands could conceivably be legalized by a state statute in a given situation, we respectfully submit that any such statute sanctioning

such activity for such purpose by a group, *neither employees nor ex-employees of the employer and not representing any of them,* is clearly discriminatory and arbitrary and cannot be sustained under any theory as a proper exercise of police power.

It appears that appellant is denied relief against appellees merely by reason of the fact that appellees are labor unions having in their memberships employees of other employers in the same crafts. Unquestionably, appellant would have obtained the relief sought but for the fact that appellees were such labor unions. This appears from the statement contained in the majority opinion of the Supreme Court of Wisconsin in this case to the effect that "where the primary purpose of the acts complained of is to protect and improve the condition of those whom the unions represent, such action is justifiable, because it tends to promote the welfare of the members of the union engaged in the same craft." (R. 121)

If the denial of relief to appellant can be sustained on the ground thus stated by the Supreme Court of the State of Wisconsin in the majority opinion, picketing and related activities against an individual *employing no one,* carried on for the purpose of forcing him to give up his work; if carried on by labor unions to further the interests of their members, should likewise not be restrained. If not, any classification which permits picketing against an employer for the purpose of forcing him to agree not to work with his own hands and accords relief to an individual working for himself and not employing any help is wholly without reason and is entirely arbitrary and capricious and cannot be squared with the requirement for the equal protection of the laws guaranteed under Section 1 of the Fourteenth Amendment to the Federal Constitution.

We respectfully submit that Mr. Justice Fowler, in his dissenting opinion in this case, which was concurred in by Mr. Justice Nelson, had the correct understanding when he stated:

> "And as I understand the welfare requirement, the welfare served must be that of the public, not that of a particular class of the public to the detriment of another class of the public. To rule that peaceful picketing in every case is lawful, would serve the interest of organized labor to the detriment of unorganized labor and not induce to the welfare of the public as a whole. * * * To justify statutes affecting one class of the society to the detriment of another class, if there can be any such justification, the advantage to the one class must at least so overbalance the disadvantages to the other that the welfare of the public as a whole is thereby advanced. The instant statute, if applied to the situation here involved, in my opinion does not meet these tests." (R. 130)

We respectfully submit that the statutes in question, as construed by the Supreme Court of Wisconsin, clearly violate the guaranty of equal protection of the laws to the appellant prescribed in Section 1 of the Fourteenth Amendment to the Federal Constitution for the reason that the classifications made under the statute, which deny him relief against the activities of the appellees merely because of the fact that he is an employer or merely because of the fact that the appellees are labor unions, are wholly unreasonable, arbitrary and capricious and have no relation to the public health, safety, good order or welfare and are statutes intended to and having the effect of merely furthering the interests of one group at the expense of another.

POINT III.

Inasmuch as None of Senn's Employees Were Members of Appellee Unions and Said Unions Represented None of His Employees, the Statutes, Construed so as

to Deny Senn the Right to Relief from Picketing and Related Activities by Said Unions, Deprived Him of Liberty and Property Without Due Process and Denied Him the Equal Protection of the Laws.

The trial court found, upon undisputed evidence, in Finding of Fact No. 7, as follows:

> "7. That none of the employees of the plaintiff were at the time of the commencement of this action members of either of said defendant unions; that no contractual relation of any kind exists between the plaintiff and the defendant unions; that the defendant unions have not been designated by any of the plaintiff's employees as their agent for collective bargaining or for any other purpose." (R. 26)

This was the precise situation in the case of *American Furniture Company v. I. B. of T. C. and H. of A., etc.*, 268 N. W. 250, (not yet officially reported) decided by the Supreme Court of Wisconsin on the same day it decided the *Senn* case. In that case the Supreme Court of Wisconsin upheld, as against the Fourteenth Amendment to the Constitution of the United States, the statutes in question here. In its opinion on the motion for rehearing in the *Senn* case, the Supreme Court of Wisconsin referred to the *American Furniture Company* case as having disposed of the contentions of Senn in this case in regard to the constitutionality of these statutes and said:

> "These contentions were urged in the original brief of plaintiff, were fully considered by this court in the decision of this case, and held to be without merit. These claims were not more particularly treated in the opinion deciding this case, because, as disclosed in the opinion, the views of this court upon the constitutional questions raised were decided adversely to the contentions of plaintiff in the case of American Furniture Co. v. I. B. of T. C. and H. of A. etc., 268 N. W. 250, decided at the same time." (R. 132)

"It is submitted that these statutes, construed by the Supreme Court of Wisconsin as permitting an absolute stranger to an employer, upon his refusal to comply with certain demands, to picket and banner such employer to force him to accede to such demands, deny to appellant due process of law and the equal protection of the laws.

It was stated by this court, in *Truax v. Corrigan,* 257 U. S. 312, 337, 66 L. Ed. 254, with reference to this sort of classification:

> "But we venture to think that not in any of the cases in this court has classification of persons of sound mind and full responsibility, having no special relation to each other, in respect of remedial procedure for an admitted tort, been sustained. Classification must be reasonable. As was said in Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 155, 41 L. ed. 668, 17 Sup. Ct. Rep. 255, classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.' As was said in Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 293, 42 L. ed. 1037, 1042, 18 Sup. Ct. Rep. 594: 'The rule . . . (i. e., of the equality clause) is not a substitute for municipal law; it only prescribes that that law have the attribute of equality of operation, and equality of operation does not mean indiscriminate operation on persons merely as such, but on persons according to their relations."

Considering the contention that the classification between employers and ex-employees was reasonable and valid, this court stated in the *Truax* case, at page 339:

> "It is really a little difficult to say, if such classification can be sustained, why special legislative treatment of assaults upon an employer or his employees by ex-employees may not be sustained with equal reason."

In fact, such a statute was proposed in Massachusetts and was the subject of an advisory opinion, *In re Opinion of*

the Justices, 211 Mass. 618, 98 N. E. 337. The proposed statute provided that an action against a trade union or an association of employers, or against members or officials thereof, on behalf of themselves and of other members of a trade union or association of employers, shall not be entertained by any court. In the advisory opinion, the court held that such a statute would be in conflict with the Fourteenth Amendment, and said at page 619:

> "The proposed bill to exempt associations of employers and trade unions and their members and officials from actions of tort committed by or on behalf of such association or union is plainly contrary to these constitutional guarantees. It gives to certain favored ones, selected arbitrarily, immunity from that equal liability for civil wrongs which is a sign of equality between citizens and residents. It undertakes to clothe combinations of employers and laborers with special power denied to other employers and laborers and other members of society. In another respect, it deprives all individuals and associations, other than those named, of the protection to safety, liberty and property which any free government must secure to its subjects. * * * It imposes upon some burdens of which others in like situation are relieved. *It throws obstacles in the pathway of those outside unions or associations in the pursuit of their livelihood and in the prosecution of their business not interposed in the way of members of such organizations.* It purposes to give to one class of wage-earners advantages withheld from others not belonging to a trade union who are engaged in the same kind of work and for the same employer. It frees one set of employers from obligations to which their competitors, who are independent of the association, are subjected. In short, it destroys equality and creates special privilege." (Italics ours)

In the *American Furniture Company* case, 268 N. W. 250, the Supreme Court of Wisconsin, in the majority opinion, said at page 265:

"The law plainly protects not the unorganized individuals constituting the employees, but the right of employees to act in groups or associations. It deals with the collective effort of employees to better their conditions, and it is only their activities in this direction that are brought within the protection of the statute. *The rights of employees not to organize and not to name bargaining agents is neither fostered nor protected.* Where the employees have neither organized and named their bargaining representatives nor taken any steps so to organize, we see nothing in the act which prohibits the employer selecting their bargaining agent by contract with a labor union which is not subject to his domination. Such a step promotes rather than defeats the purpose of the code." (Italics ours)

At page 263, the majority opinion says:

"We conclude that defendant unions had standing under the act, although representing none of the members of their craft employed by plaintiff, and although there was no dispute between plaintiff and its employees, to be a disputant with plaintiff, and that unionization of plaintiff's store could constitute a proper subject for dispute. We further conclude that the act, so construed, is not repugnant to any constitutional provision."

A few months before the decision of the Supreme Court of Wisconsin in the *American Furniture Company* case, the U. S. Circuit Court of Appeals for the Seventh Circuit had before it the same question, that is, whether or not a labor dispute under the Norris-La Guardia Act and the Wisconsin Labor Code existed where the demanding union did not represent any of the employees of the employer and where none of the employees of the employer were members of the union, and whether a demand of that nature by the union, under such circumstances, was unlawful. This was on appeal from an interlocutory order of the United States District Court for the Eastern District of Wisconsin, enjoining the union and its representatives from picketing the

plaintiff's markets in Milwaukee. *Edward Lauf v. E. G. Shinner & Co.*, 82 F. (2d) 68, decided February 29, 1936. In the *Lauf* case, the Circuit Court of Appeals for the Seventh Circuit followed its decision in the case of *United Electric Coal Companies v. Rice*, 80 F. (2d) 1, decided October 26, 1935, in which case a writ of certiorari was denied by this court on March 2, 1936, and held that no labor dispute existed and the employer was entitled to injunctive relief.

To the same effect, on the construction of the statute that no labor dispute existed under the same conditions, are the following cases:

Safeway Stores, Inc. v. Retail Clerk's Union, 51 P. (2nd) (Wash.) 372, 379, decided in December, 1935.

218-220 *Market St. Corp. v. Delicatessen, etc. Union*, 118 N. J. Eq. 448, decided July 15, 1935.

The majority opinion of the Wisconsin Supreme Court in the *American Furniture Company* case noted the decision in the *Lauf* case, but refused to follow it, and held that under the same circumstances a labor dispute existed; that the union had the right to picket the American Furniture Company for the purpose of forcing the American Furniture Company to coerce its employees to join the union and that sections 103.51 to 103.63 of the Wisconsin Statutes of 1935, so construed, were constitutional and valid and did not violate the Fourteenth Amendment to the Constitution of the United States.

In the minority opinion in the *American Furniture Company* case by Mr. Justice Fowler, who wrote the minority opinion in the *Senn* case, it was held that the same construction of the statutes adopted by the Circuit Court of Appeals of the Seventh Circuit in the *Lauf* case was the correct construction. In considering what was intended by said Wisconsin Statutes and by Congress in the enactment of the

Norris-La Guardia Act, 29 U.S.C.A., Sections 101 to 115, which is very similar to the Wisconsin Labor Code, and, among other things, limits the power of the lower federal courts as to the issuance of injunctions in labor disputes as defined in that act, said minority opinion stated at pages 267-268:

> "I am not unmindful of the contention of respondents that when the bill that was enacted into the federal statute was before the Congress of the United States, the view of the sponsors of the bill was that it would cover every sort of labor controversy. Nor am I unmindful of statements in the reports of Committees of the houses of Congress to the effect that it was intended to cover deficiencies in the Clayton Act and was conceived as covering labor disputes not within that act. Perhaps it was contemplated by the sponsors of the bill that it covered all sorts of labor disputes. Nevertheless the bill was so framed as not to cover any controversies except those arising between employer and employee. It was intended to cover the point of outside labor organizations espousing the cause of employees when a controversy existed between them and their employer, and there is nothing in the act itself or in the statements in the committee reports to indicate that any controversy except such as arose primarily between employer and employee was in mind. The construction of the act urged by the respondents and upheld by this court would authorize any labor union in Milwaukee or elsewhere to picket every manufacturing plant and every retail mercantile establishment in the state that would not compel its employees against their wishes and when entirely satisfied with their wages and their conditions and hours of labor, to form and join a labor union, or join an existing labor union, or be discharged. I do not believe that the Legislature or the Congress intended or imagined that the bill would legalize such picketing."

It is submitted that a demand upon an employer by a union having no contractual relations with him, having none of his employees in its membership, and representing none of his employees, that he cease to work with his own

hands in his own lawful business is so shocking and so intolerable that the natural inference of the human mind would be that under constitutional government no statute could legalize picketing, the object of which is to force submission to such a demand. Such a demand goes to the very foundation of a person's life. If carried out to its logical result, it would prevent anybody from going into business for himself where it is necessary for him, in order to conduct that business, to work for himself, if a labor union conceived it to be to the interest of its members to stop any newcomer from doing that work.

The very startling result of such a situation indicates that if such demands so made by such persons, and such conduct as is here shown to be indulged in to enforce such demands, is held permissible, the liberty of the individual to make a livelihood in his own business by his own work is gone—gone because persons in the some line of business feel that their welfare would be promoted by compelling him to let someone else do the work which he wanted to do himself. We submit that this is in utter disregard of the relation of public good to individual liberty, and that a man's right to labor, which is of the very essence of individual liberty, cannot be impaired by legislative enactments designed, as the Supreme Court of Wisconsin said in the majority opinion in the *American Furniture Company* case, for the purpose of protecting the organized worker and not the unorganized worker, or, as the same court said in the *Senn* case in the majority opinion at page 273:

> "In view of our decision in the American Furniture Co. Case, supra, and the cases there analyzed in the opinion written by Mr. Justice Wickhem, it is apparent that, under the laws of Wisconsin, where the primary purpose of the acts complained of is to protect and improve the condition of those whom the unions represent, such action is justifiable, because it tends to promote the welfare of the members of the union engaged in the same craft." (R. 121)

It is respectfully submitted that, regardless of the right of the legislature to legislate concerning the rights and methods of collective bargaining and to make lawful such conduct as is free from fraud and violence, it is a far cry to say that the state legislature can sanction the activities directed against this appellant by unions, strangers to him and his employees, without depriving appellant of property without due process of law and denying him the equal protection of the laws. With respect to the denial of the equal protection of the laws, we do not think that any parallel can be conceived in which third persons can visit such conduct upon another, and that in no situation, relationship, walk of life or classification can such a thing for a moment be thought of as permissible.

Could the legislature, conceiving operation of chain stores to be in the public interest, pass a statute making it lawful for operators of chain stores to picket stores independently owned for the purpose of forcing them into the chain store combination on the ground that the public interest would be served through more employment, better wages and cheaper prices? We think the mere statement of this question answers itself. The basis for that classification would be no different, no sounder nor any less arbitrary, in any view of economic philosophy, than the classification here involved. We state, as did the minority in the dissenting opinion:

The practice upheld by the majority of the court is Un-American, oppressive and intolerable. It is contrary to the concept that we have always had of the fundamental and inalienable rights of the individual citizen secured to him by the Constitution of the United States. We will not yield that concept until it is declared erroneous by the final arbiter of that constitution. Our concept of the inherent rights of man under the Constitution may be merely an ideal that we may eventually have to give up, but we are

still strong in our faith in it; and we will ever cherish it unless it shall be destroyed by the ultimate authority, the Supreme Court of the United States.

CONCLUSION

It is respectfully submitted that the judgment of the Supreme Court of Wisconsin, affirming the judgment of the Circuit Court of Milwaukee County, Wisconsin, denying the appellant the injunctional relief which he sought, be reversed with directions to the Supreme Court of Wisconsin to direct the trial court to grant the relief requested by the appellant in his complaint.

All of which is respectfully submitted.

LEON B. LAMFROM,

Counsel for Appellant.

APPENDIX

WISCONSIN LABOR CODE

(Wisconsin Statutes of 1935)

103.51 *Public policy as to collective bargaining.* In the interpretation and application of sections 103.51 to 103.63 the public policy of this state is declared as follows:

Negotiation of terms and conditions of labor should result from voluntary agreement between employer and employes. Governmental authority has permitted and encouraged employers to organize in the corporate and other forms of capital control. In dealing with such employers, the individual unorganized worker is helpless to exercise actual liberty of contract and protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment. Therefore it is necessary that the individual workman have full freedom of association, self-organization, and the designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

103.52 *"Yellow-dog" contracts.* Every undertaking or promise made after the taking effect of this action, whether written or oral, express or implied, between any employe or prospective employe and his employer, prospective employer or any other individual, firm, company, association, or corporation, whereby

(1) Either party thereto undertakes or promises to join or to remain a member of some specific labor organization or organizations or to join or remain a member of some spe-

cific employer organization or any employer organization or organizations; or

(2) Either party thereto undertakes or promises not to join or not to remain a member of some specific labor organization or any labor organization or organizations, or of some specific employer organization or any employer organization or organizations; or

(3) Either party thereto undertakes or promises that he will withdraw from an employment relation in the event that he joins or remains a member of some specific labor organization or any labor organization or organizations, or of some specific employer organization or any employer organization or organizations;

Is hereby declared to be contrary to public policy and shall not afford any basis for the granting of legal or equitable relief by any court against a party to such undertaking or promise, or against any other persons who may advise, urge or induce, without fraud, violence, or threat thereof, either party thereto to act in disregard of such undertaking or promise. This section in its entirety is supplemental to and of subsection (1) of section 103.46 of the statutes.

103.53 *Lawful conduct in labor disputes.* (1) The following acts, whether performed singly or in concert, shall be legal:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment regardless of any promise, undertaking, contract or agreement in violation of the public policy declared in section 103.52;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103.52;

(c) Paying or giving to, any person any strike or unemployment benefits or insurance or other moneys or things of value;

(d) By all lawful means aiding any person who is being proceeded against in, or is prosecuting any action or suit in any court of the United States or of any state;

(e) Giving publicity to and obtaining or communicating information regarding the existence of, or the facts involved in, any dispute, whether by advertising, speaking, patrolling any public street or any place where any person or persons may lawfully be, without intimidation or coercion, or by any other method not involving fraud, violence, breach of the peace, or threat thereof;

(f) Ceasing to patronize or to employ any person or persons, but nothing herein shall be construed to legalize a secondary boycott;

(g) Assembling peaceably to do or to organize to do any of the acts heretofore specified or to promote lawful interests;

(h) Advising or notifying any person or persons of an intention to do any of the acts heretofore specified;

(i) Agreeing with other persons to do or not to do any of the acts heretofore specified;

(j) Advising, urging, or inducing without fraud, violence, or threat thereof, others to do the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103.52; and

(k) Doing in concert any or all of the acts heretofore specified shall not constitute an unlawful combination or conspiracy;

(1) Peaceful picketing or patrolling, whether engaged in singly or in numbers, shall be legal.

(2) No court, nor any judge or judges thereof, shall have jurisdiction to issue any restraining order or temporary or permanent injunction which, in specific or general terms, prohibits any person or persons from doing, whether singly or in concert, any of the foregoing acts.

103.54 *Responsibility for unlawful acts.* No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute (as these terms are defined in section 103.62) shall be held responsible or liable in any civil action at law or suit in equity, or in any criminal prosecution, for the unlawful acts of individual officers, members, or agents, except upon proof by a preponderance of the evidence and without the aid of any presumptions of law or fact, both of (a) the doing of such acts by persons who are officers, members or agents of any such association or organization, and (b) actual participation in, or actual authorization of, such acts, or ratification of such acts after actual knowledge thereof by such association or organization.

103.55 *Public policy as to labor litigation.* In the interpretation and application of sections 103.56 to 103.59, the public policy of this state is declared to be:

Equity procedure that permits a complaining party to obtain sweeping injunctive relief that is not preceded by or conditioned upon notice to and hearing of the responding party or parties, or that issues after hearing based upon written affidavits alone and not wholly or in part upon examination, confrontation and cross-examination of witnesses in open court, is peculiarly subject to abuse in labor litigation for the reasons that

(1) The status quo cannot be maintained but is necessarily altered by the injunction;

(2) Determination of issues of veracity and of probability of fact from affidavits of the opposing parties that are contradictory and, under the circumstances, untrustworthy rather than from oral examination in open court is subject to grave error;

(3) Error in issuing the injunctive relief is usually irreparable to the opposing party; and

(4) Delay incident to the normal course of appellate practice frequently makes ultimate correction of error in law or in fact unavailing in the particular case.

103.56 *Injunctions: conditions of issuance; restraining orders.* (1) No court nor any judge or judges thereof shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as defined in section 103.62, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of all the following facts by the court or judge or judges thereof:

(a) That unlawful acts have been threatened or committed and will be executed or continued unless restrained.

(b) That substantial and irreparable injury to complainant's property will follow unless the relief requested is granted;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial thereof than will be inflicted upon defendants by the granting thereof;

(d) That the relief to be granted does not violate the provisions of section 103.53;

(e) That complainant has no adequate remedy at law; and

(f) That the public officers charged with the duty to protect complainant's property have failed or are unable to furnish adequate protection.

(2) Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also to those public officers charged with the duty to protect complainant's property. Provided, however, that if a complainant shall also allege that unless a temporary restraining order shall be issued before such hearing may be had, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be granted upon the expiration of such reasonable notice of application therefor as the court may direct by order to show cause, but in no case less than forty-eight hours.

(3) Such order to show cause shall be served upon such party or parties as are sought to be restrained and as shall be specified in said order, and then only upon testimony under oath, or in the discretion of the court, upon affidavits, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing as herein provided for.

(4) Such a temporary restraining order shall be effective for no longer than five days, and at the expiration of said five days shall become void and not subject to renewal or extension, provided, however, that if the hearing for a temporary injunction shall have been begun before the expiration of the said five days the restraining order may in the

court's discretion be continued until a decision is reached upon the issuance of the temporary injunction.

(5) No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.

(6) The undertaking herein mentioned shall be understood to signify an agreement entered into by the complainant and the surety upon which a decree may be rendered in the same suit or proceeding against said complainant and surety, the said complainant and surety submitting themselves to the jurisdiction of the court for that purpose. But nothing herein contained shall deprive any party having a claim or cause of action under or upon such undertaking from electing to pursue his ordinary remedy by suit at law or in equity.

103.57 *Clean hands doctrine.* No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any legal obligation which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available machinery of governmental mediation or voluntary arbitration, but nothing herein contained shall be deemed to require the court to await the action of any such tribunal if irreparable injury is threatened.

103.58 *Injunctions: contents.* Except as provided in section 103.56, no restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the court in the record of the case prior to the issuance of such restraining order or injunction, and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and expressly included in said findings of fact made and filed by the court as provided herein; and shall be binding only upon the parties to the suit, their agents, servants, employes and attorneys, or those in active concert and participation with them, and who shall by personal service or otherwise have received actual notice of the same.

103.59 *Injunctions: appeals.* Whenever any court or judge or judges thereof shall issue or deny any temporary injunction in a case involving or growing out of a labor dispute, the court shall, upon the request of any party to the proceedings, and on his filing the usual bond for costs, forthwith certify the entire record of the case, including a transcript of the evidence taken, to the appropriate appellate court for its review. Upon the filing of such record in the appropriate appellate court the appeal shall be heard with the greatest possible expedition, giving the proceeding precedence over all other matters except older matters of the same character.

103.60 *Contempt cases.* In all cases where a person shall be charged with civil or criminal contempt for violation of a restraining order or injunction issued by a court or judge or judges thereof, the accused shall enjoy:

(1) The rights as to admission to bail that are accorded to persons accused of crime.

(2) The right to be notified of the accusation and a reasonable time to make a defense, provided the alleged contempt is not committed in the immediate view or presence of the court.

(3) Upon demand, the right to a speedy and public trial by an impartial jury of the county wherein the contempt shall have been committed, provided that this requirement shall not be construed to apply to contempts committed in the presence of the court or so near thereto as to interfere directly with the administration of justice or to apply to the misbehavior, misconduct, or disobedience of any officer of the court in respect to the writs, orders, or process of the court. All contempt proceedings, whether civil or criminal, brought for the alleged violation of any such restraining order or injunction, are, and hereby are declared to be independent, original, special proceedings, and shall require a unanimous finding of the jury.

(4) The right to file with the court a demand for the retirement of the judge sitting in the proceeding, upon an affidavit of prejudice being filed as is now provided by law in other cases. Upon the filing of any such affidavit, the judge shall thereupon proceed no further, but another judge shall be designated as is now provided for in other cases. The affidavit shall be filed prior to the hearing in the contempt proceeding.

103.61 *Punishment for contempt.* Punishment for a contempt, specified in section 103.60, may be by fine, not exceeding twenty-five dollars, or by imprisonment not exceeding ten days, in the jail of the county where the court is sitting, or both, in the discretion of the court. Where a person is committed to jail, for the nonpayment of such a fine, he must be discharged at the expiration of fifteen days; but where he is also committed for a definite time, the fifteen

days must be computed from the expiration of the definite time.

103.62 *Definitions.* When used in sections 103.51 to 103.63, and for the purposes of these sections:

(1) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in a single industry, trade, craft, or occupation; or who are employes of one employer; or who are members of the same or an affiliated organization of employers or employes; whether such dispute is (1) between one or more employers or associations of employers and one or more employes or associations of employes; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employes or associations of employes and one or more employes or associations of employes; or when the case involves any conflicting or competing interests in a "labor dispute" (as defined in subsection (3) of "persons participating or interested" therein (as defined in subsection (2)).

(2) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it and if he or it is engaged in the industry, trade, craft, or occupation in which such dispute occurs, or is a member, officer, or agent of any association of employers or employes engaged in such industry, trade, craft, or occupation.

(3) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, or concerning employ-

ment relations, or any other controversy arising out of the respective interests of employer and employe, regardless of whether or not the disputants stand in the proximate relation of employer and employe.

103.63 *Severability of provisions.* If any provision of sections 103.51 to 103.63 or the applications thereof to any person or circumstance is held invalid, the remainder of these sections and the application of such provisions to other persons or circumstances shall not be affected thereby.

PERTINENT SECTIONS OF WISCONSIN CONSTITUTION

(Art. VII) *Judicial power.* Section 2. The judicial power of this state, both as to matters of law and equity, shall be vested in a supreme court, circuit courts, courts of probate, and in justices of the peace. The legislature may also vest such jurisdiction as shall be deemed necessary in municipal courts, and shall have power to establish inferior courts in the several counties, with limited civil and criminal jurisdiction. Provided, that the jurisdiction which may be vested in municipal courts shall not exceed in their respective municipalities that of circuit courts in their respective circuits as prescribed in this constitution; and that the legislature shall provide as well for the election of judges of the municipal courts as of the judges of inferior courts, by the qualified electors of the respective jurisdictions. The term of office of the judges of the said municipal and inferior courts shall not be longer than that of the judges of the circuit courts.

(Art. VII) *Supreme court, jurisdiction.* Section 3. The supreme court, except in cases otherwise provided in this constitution, shall have appellate jurisdiction only, which shall be co-extensive with the state; but in no case removed to the supreme court shall a trial by jury be allowed. The supreme court shall have a general superintending control over all inferior courts; it shall have power to issue writs of habeas corpus, mandamus, injunction, quo warranto, certiorari, and other original and remedial writs, and to hear and determine the same.

(Art. VII) *Circuit court, jurisdiction.* Section 8. The circuit courts shall have original jurisdiction in all matters civil and criminal within this state, not excepted in this constitution, and not hereafter prohibited by law; and appellate jurisdiction from all inferior courts and tribunals, and a super-

visory control over the same. They shall also have the power to issue writs of habeas corpus, mandamus, injunction, quo warranto, certiorari, and all other writs necessary to carry into effect their orders, judgments and decrees, and give them a general control over inferior courts and jurisdictions.

(*The foregoing constitutional provisions will be found printed in the Wisconsin Statutes of* 1935 *at pp.* 42-44.)